STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 23, 2007
v	No. 262942 Macomb Circuit Court
JASON LEE BADGLEY, Defendant-Appellant.	LC No. 04-003740-FC

Before: Saad, P.J., and Cavanagh and Schuette, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317, and first-degree child abuse, MCL 750.136(B)(2). He was sentenced to concurrent prison terms of 34 to 60 years for the murder conviction, and 9 to 15 years for the child abuse conviction. He appeals as of right. We affirm.

I. Underlying Facts

Defendant was convicted of killing his five-week-old son on September 11, 2004, in defendant's Clinton Township apartment. Vikki Lee Gohsman, the victim's mother and defendant's fiancée, testified that she and her three-year-old son[1] left their apartment at about 10:00 a.m., leaving the victim with defendant. When Gohsman returned home at 3:30 p.m., defendant was administering CPR to the victim. Gohsman described defendant as being very upset, and described the victim as being blue and unresponsive. Defendant directed Gohsman to call 911, and Gohsman used a neighbor's phone to do so. Clinton Township police officers arrived, and observed the victim lying on his back on the floor, and described him as "blue in color" and unresponsive. As the officers were administering CPR on the victim, defendant came in and said that he thought he broke the victim's arm. Emergency personnel arrived, and transported the victim to the hospital, where he was pronounced dead. A medical examiner advised the officers that the victim suffered skull fractures in three places, broken ribs, and a broken arm. A police officer testified that defendant was thereafter arrested because his initial explanation of how the child was injured did not coincide with the victim's injuries.

[1] Defendant is not the biological father of Gohsman's three-year-old son.

Police officers testified that, throughout their questioning, defendant would change or add information regarding how the victim was injured. Defendant initially told police officers that the victim woke up crying at about 1:00 p.m., and he tried to calm the victim but nothing worked. At one point, defendant fell asleep as he was bouncing the victim on his lap, and the victim fell between defendant's legs. When defendant tried to grab the victim's left arm to prevent him from falling, he caught his hand or arm and heard a loud pop. Defendant subsequently told the officers that, at one point, he was holding the victim, and the victim twisted out of his arms, fell to the floor, and broke his arm. Defendant explained that at some point after the victim was on the floor, the victim continued crying and he stated, "Get this kid the f**k away from me." Defendant then pushed the victim across the room with his foot on his buttocks, resulting in the victim traveling about five feet. Defendant explained that the victim's head injuries could have been caused by him hitting his head on a bottle or shoe when he fell, or as he was traveling across the carpet. Defendant stated that he was very frustrated and, at one point, grabbed the victim around the neck with two hands and squeezed it for a second or two. The victim stopped breathing briefly. The victim's crying then accelerated. Defendant stated that he picked up the victim with two hands in the chest area, and shook him "pretty hard." The victim continued to cry and "was getting pissy," and defendant "jab[bed]" the victim once in the back of the head with a closed fist. The incident lasted 10 to 15 minutes. Defendant stated that he "didn't want to hurt him."

The Macomb County medical examiner testified that the autopsy revealed that the victim had no prior medical conditions, and suffered "severe injuries." An external examination showed a contusion on the right side of the head, "small bruising and a small abrasion on the undersurface of the chin," bruising on the inner surface of the upper lip, and "a gross deformity of the right forearm secondary to displaced fractures." The bruising in the neck area indicated "some type of impact or movement of something around the neck." The internal examination revealed a skull fracture, subdural hematoma, subarachnoid hemorrhage, brain swelling, and retinal and optic hemorrhages. The head injuries indicated a "significant blunt impact," such as one caused by a fist. The retinal hemorrhages were either the "direct result of the severe impact to the head, or a secondary component of shaking." The victim also suffered six acute rib fractures and acute chest wall hemorrhage, caused by "aggressive grabbing and squeezing of the child's chest." The victim had a displaced arm fracture, with two broken bones. The medical examiner determined that the cause of death was "blunt head injuries," and the manner of death was homicide.

Defendant's father and Gohsman testified, and described defendant as being a loving and caring father, who was excited and proud about the victim's birth, and who never abused the victim or Gohsman's three-year-old son. Gohsman also testified that, on September 10, 2004, the victim "seemed to be getting sick," was "crankier than usual," and was "very difficult" to "calm down."

II. Jury Instructions

Defendant first argues that the trial court erred in refusing to instruct the jury on voluntary and involuntary manslaughter as lesser offenses of first-degree felony murder, and third-degree child abuse as a lesser offense of first-degree child abuse. We disagree.

Claims of instructional error are reviewed de novo. *People v Hubbard (After Remand)*, 217 Mich App 459, 487; 552 NW2d 493 (1996). MCL 768.32 only permits instruction on necessarily lesser included offenses, not cognate lesser offenses. *People v Reese*, 466 Mich 440, 446; 647 NW2d 498 (2002). "Such an instruction is proper if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser offense and it is supported by a rational view of the evidence." *Id*.

A. Manslaughter

Both voluntary and involuntary manslaughter are necessarily included lesser offenses of murder, distinguished by the element of malice. *People v Mendoza*, 468 Mich 527, 533-534, 540-541; 664 NW2d 685 (2003). "Consequently, when a defendant is charged with murder, an instruction for voluntary and involuntary manslaughter must be given if supported by a rational view of the evidence." *Id*. at 541.

"[T]o show voluntary manslaughter, one must show that the defendant killed in the heat of passion, the passion was caused by adequate provocation, and there was not a lapse of time during which a reasonable person could control his passions." *Id*. at 535. "[P]rovocation is that circumstance that negates the presence of malice." *Id*. at 536. The degree of provocation required to mitigate a killing from murder to manslaughter "is that which causes the defendant to act out of passion rather than reason." *People v Sullivan*, 231 Mich App 510, 518; 586 NW2d 578 (1998), aff'd 461 Mich 992 (2000). "[T]he provocation must be adequate, namely, that which would cause a *reasonable person* to lose control." *Id*. (emphasis in original). "The determination of what is reasonable provocation is a question of fact for the fact-finder." *Id*. But "[w]here, as a matter of law, no reasonable jury could find that the provocation was adequate, the court may exclude evidence of the provocation." *Id*.

Contrary to defendant's argument, no reasonable jury could find that the provocation here was adequate to cause a reasonable person to lose control. Defendant argues that adequate provocation existed because he "was sick," the victim "had a cold, was cranky, had been up all night and hence Defendant had been up all night, and that the victim could not be soothed." Defendant adds that he had "straightened [sic] financial circumstances," and as he told the police officers, he did not intend to hurt the victim. But a five-week-old baby crying incessantly, having a cold, and being "crankier than usual" is not adequate provocation to move a reasonable person to choke, jab, kick, and forcefully shake the infant over a period of 10 to 15 minutes. Because a rational view of the evidence did not support a voluntary manslaughter instruction, the trial court did not err by refusing to provide that instruction.

The trial court also did not err in refusing to instruct the jury on involuntary manslaughter. Defendant argues that the evidence "clearly supports" that he acted without malice, and "committed an unlawful act . . . with an intent to injure, or grossly negligently . . ." As it relates to this case, if a homicide "was committed with a lesser mens rea of gross negligence or an intent to injure, *and not malice*, it is not murder, but only involuntary manslaughter." *People v Holtschlag*, 471 Mich 1, 21; 684 NW2d 730 (2004) (emphasis added). "Malice is defined as 'the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and willful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm.'" *People v Werner*, 254 Mich App 528, 531; 659 NW2d 688 (2002) (citation omitted).

The evidence showed that the injuries inflicted on the five-week-old victim by defendant were extremely forceful and would naturally tend to, and did in fact, cause death. Defendant admitted that he "jab[bed]" the infant in the head with a closed fist, held the infant with two hands and shook him "pretty hard," choked the infant causing him to cease breathing momentarily, and shoved him with his foot to a degree that the infant traveled approximately five feet. As a result of defendant's acts, the victim suffered a skull fracture, subdural hematoma, subarachnoid hemorrhage, brain swelling, retinal and optic hemorrhages, six acute rib fractures and acute chest wall hemorrhage, and a displaced arm fracture. Because no rational juror, under these facts, could conclude that defendant's acts on this five-week-old victim were anything other than acts committed with malice, the trial court did not err by refusing to provide an involuntary manslaughter instruction.

B. Third-degree Child Abuse

"A person is guilty of child abuse in the first degree if the person knowingly or intentionally causes serious physical or serious mental harm to a child." MCL 750.136b(2). A person is guilty of third-degree child abuse if "the person knowingly or intentionally causes physical harm to a child." MCL 750.136b(5). Because all elements of third-degree child abuse are found within first-degree child abuse and first-degree child abuse requires the jury to find a disputed factual element, i.e., that the physical harm is serious, third-degree child abuse is a necessarily included lesser offense of first-degree child abuse. Consequently, the instruction is proper if it is supported by a rational view of the evidence. *Reese*, *supra*.

MCL 750.136b(1)(e) defines "physical harm" as "any injury to a child's physical condition." In contrast, MCL 750.136b(1)(f) defines "serious physical harm" as "any physical injury to a child that seriously impairs the child's health or physical well-being, including, but not limited to, brain damage, a skull or bone fracture, subdural hemorrhage or hematoma, dislocation, sprain, internal injury . . . ." There was no dispute that the victim died after suffering a serious physical injury. Indeed, it was undisputed that he suffered brain damage, subdural hematoma, and skull and arm fractures, all of which are expressly listed in MCL 750.136b(1)(f). The defense only disputed whether defendant acted with the necessary intent to cause the injuries. Therefore, an instruction on third-degree child abuse was not supported by a rational view of the evidence.

Furthermore, the jury was instructed on the lesser included offense of second-degree child abuse, but defendant was convicted of first-degree child abuse. The jury's rejection of the intermediate offense in favor of first-degree child abuse reflects an unwillingness to convict on a lesser included offense. See *People v Raper*, 222 Mich App 475, 483; 563 NW2d 709 (1997). Defendant is not entitled to appellate relief.

III. Exclusion of Witness Testimony

Next, defendant argues that the trial court abused its discretion when it precluded defense witnesses from testifying about defendant's "mental state" to the extent that he could not have formed the requisite intent to commit murder, thereby compromising his right to present a defense. We disagree.

The trial court's decision to admit evidence is reviewed for an abuse of discretion. *People v Bahoda*, 448 Mich 261, 289; 531 NW2d 659 (1995). A decision on a close evidentiary question ordinarily cannot be an abuse of discretion. *People v Sabin (After Remand)*, 463 Mich 43, 67; 614 NW2d 888 (2000).

On this record, we cannot conclude that the trial court abused its discretion. Throughout trial, defendant sought to present testimony to establish that he was incapable of forming the requisite intent to commit murder or to intentionally harm the victim. First, as the trial court ruled, defendant's attempt to present evidence through Gohsman of his affected mental state because of a "tremendous amount of pressure and stress," to negate the element of intent constituted a "diminished capacity" defense. Our Supreme Court has held that "diminished capacity" is not a viable defense in Michigan. *People v Carpenter*, 464 Mich 223, 241; 627 NW2d 276 (2001) (a court may not admit "evidence of mental capacity short of legal insanity to avoid or reduce criminal responsibility by negating specific intent").[2]

Furthermore, the trial court correctly precluded Gohsman and other lay witnesses from testifying about whether they believed defendant was capable of forming the intent to commit murder. Contrary to defendant's assertion in this regard, the excluded testimony was not lay testimony regarding the witnesses' personal knowledge, general opinion, or observation of defendant, but rather testimony regarding the psychological effects of certain circumstances and surroundings on defendant's state of mind. We agree that whether defendant was capable of forming the requisite intent would involve "expert testimony as to the psychological makeup of defendant," and is beyond the scope of testimony properly offered by a lay witness. See MRE 602 and MRE 701.

Likewise, the trial court properly excluded Gohsman's opinions about what happened in her absence, and what defendant's state of mind was when he harmed the child because it called for speculation. There was no basis for Gohsman to testify about what defendant was thinking at the time of the offenses. See MRE 602. Further, there was no basis for Gohsman to give an opinion based on a direct observation of defendant because she was not home at the time of the offenses and, in fact, had left the apartment more than five hours before the incident. See MRE 701.

We also reject defendant's claim that the trial court's evidentiary ruling deprived him of his constitutional right to present a defense. A defendant's constitutional right to present a defense and call witnesses in his defense is guaranteed by the Confrontation Clause. US Const, Am VI; Const 1963, art 1 § 20; *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993). But the right to present a defense is not absolute. *People v Hayes*, 421 Mich 271, 279; 364 NW2d 635 (1984); *People v Arenda*, 416 Mich 1, 8; 330 NW2d 814 (1982). The accused must still comply with procedural and evidentiary rules established to assure fairness and reliability in the verdict. *Hayes, supra*.

[2] Defendant did not present an insanity defense.

The trial court's rulings were not an exclusion of all evidence presenting defendant's circumstances, and did not otherwise limit defendant's opportunity to present a defense. Although the court precluded the proposed evidence, it allowed defendant great latitude to present evidence bearing on his character, common behavior, financial and social strains, the circumstances surrounding the event, as well as the victim's disposition the day before the incident.[3] Additionally, the trial court's instructions aptly informed the jury concerning the necessary state of mind for both first-degree felony murder and second-degree murder. Moreover, contrary to defendant's implication, evidentiary rulings do not ordinarily rise to the level of a constitutional violation. See *Crane v Kentucky*, 476 US 683, 690; 106 S Ct 2142; 90 L Ed 2d 636 (1986). Accordingly, reversal is not warranted on this basis.

IV. Motion to Suppress Statement

Defendant next argues that the trial court clearly erred by denying his motion to suppress his statement to the police because it was involuntary. We disagree.

Whether a defendant's statement was knowing, intelligent, and voluntary is a question of law that a court evaluates under the totality of the circumstances. *People v Cheatham*, 453 Mich 1, 27, 44; 551 NW2d 355 (1996); *People v Garvin*, 235 Mich App 90, 96; 597 NW2d 194 (1999). Deference is given to the trial court's assessment of the weight of the evidence and the credibility of the witnesses, and the trial court's findings of fact will not be disturbed unless they are clearly erroneous. *People v Sexton (After Remand)*, 461 Mich 746, 752; 609 NW2d 822 (2000); *People v Howard*, 226 Mich App 528, 543; 575 NW2d 16 (1997). A finding is clearly erroneous if it leaves the reviewing court with a definite and firm conviction that a mistake has been made. *People v Givans*, 227 Mich App 113, 119; 575 NW2d 84 (1997).

Statements of a defendant made during a custodial interrogation are inadmissible unless the defendant voluntarily, knowingly, and intelligently waived his Fifth Amendment rights. *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966); *People v Abraham*, 234 Mich App 640, 644; 599 NW2d 736 (1999). Whether a statement was voluntary is determined by examining police conduct, while whether it was made knowingly and intelligently depends in part upon the defendant's capacity. *Howard*, *supra* at 538. The prosecutor must establish a valid waiver by a preponderance of the evidence. *Abraham*, *supra* at 645. In *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988), our Supreme Court set forth the following nonexhaustive list of factors that a trial court should consider in determining whether a statement is voluntary:

[3] For example, the trial court allowed Gohsman to testify about "anything" "[u]p to the point that she left them that morning," including "what she knows about defendant," her opinions relative to her observations of defendant's care and treatment of the victim and Gohsman's older child, that she never observed defendant being hostile or abusive toward the victim, and about other pertinent relationships defendant had with others. The defense was also allowed to present evidence of defendant's environment and financial issues, Gohsman's loss of family members, difficult pregnancy, and depression, and defendant having additional responsibilities related to caring for the children.

> The age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse.

No single factor is conclusive. *Id.*; *People v Fike*, 228 Mich App 178, 181-182; 577 NW2d 903 (1998).

Defendant argues that his statement was involuntary because the interrogating officers misrepresented to him that he was not under arrest. At an evidentiary hearing, the two interrogating officers testified. Defendant did not testify. The trial court also viewed a videotape of the interview. The trial court noted that the videotape showed that defendant was told that he was not under arrest. Sergeant David Dunn testified that his first contact with defendant was in the interview room, although he directed an officer at the hospital to bring defendant to the police station for an interview. He explained that he had not made any decision relative to culpability of any party. Lieutenant Bruce Wade testified that he did not place defendant under arrest, and was unaware that defendant had been handcuffed at the hospital. Lieutenant Wade indicated that when he started reading defendant his *Miranda* warnings, defendant asked if he was being arrested. Lieutenant Wade responded, "No, I'm reading you your rights now." Lieutenant Wade admitted that, at that juncture, defendant was not free to leave.

"A confession or waiver of constitutional rights must be made without . . . deception." *People v Akins*, 259 Mich App 545, 564; 675 NW2d 863 (2003). But a misrepresentation does not render a defendant's confession inadmissible per se. Rather, it is one factor among many that is evaluated as part of the "totality of the circumstances" in determining whether a defendant's statement was voluntary. *Cipriano*, *supra* at 333-334.

Viewing the totality of the circumstances, the trial court did not clearly err in finding that defendant's statement was voluntary. As noted, the trial court had an opportunity to view the videotape of the interview, and to form its own opinion regarding the effect of the police officer's misrepresentation. The trial court found that the videotape showed that defendant "undoubtedly knew that he was not free to leave, as would a normal person under the same circumstances," and that "a reasonable person would have believed that he was in custody." It is undisputed that defendant was advised of his *Miranda* rights before he was questioned, initialed his rights, and signed a written waiver. The trial court noted that the videotape showed that *Miranda* warnings were "explicitly" given. During the interview, defendant was denied certain liberties, including his repeated requests to see his fiancée and his family, and a request for a cigarette. Further, defendant was handcuffed at the hospital, and transported to the police

station. Under these circumstances, the trial court did not clearly err in finding that any deception[4] did not in and of itself render defendant's statement involuntary.

With regard to other factors, the interview was not prolonged, lasting approximately two hours. There is no evidence that defendant was threatened, abused, or promised anything in exchange for his statements. There is likewise no evidence that defendant was intoxicated, under the influence of drugs, or deprived of food or drink.[5] Although defendant was suffering from a cold and had been awakened by the victim throughout the previous night, there is no indication that he was sleep deprived or debilitated by illness to a degree that he was unaware or not operating of his own free will. Further, defendant was 28 years old, and there is no indication that he had any learning disabilities, had been diagnosed with any psychological problems, or was otherwise unaware and not acting of his own free will. Viewing the totality of the circumstances, the record does not leave us with a firm and definite conviction that a mistake has been made.

V. Photographic Evidence

Defendant argues that the trial court abused its discretion in admitting a "gruesome autopsy photograph" that depicted the victim's broken arm. We disagree.

The decision to admit photographic evidence is within the sole discretion of the trial court and will not be disturbed on appeal absent a clear abuse of discretion. *People v Mills*, 450 Mich 61, 76; 537 NW2d 909, mod 450 Mich 1212 (1995); *People v Ho*, 231 Mich App 178, 187; 585 NW2d 357 (1998). With all photographic evidence, the proper inquiry is whether the evidence is relevant under MRE 401 and, if so, whether the probative value of the evidence is substantially outweighed by unfair prejudice under MRE 403. *Mills*, *supra* at 67-68, 76.

The photograph was relevant to show the extent to which the victim was abused, as well as being instructive in depicting the location, nature, and extent of one of the victim's injuries. See *People v Williams*, 422 Mich 381, 392; 373 NW2d 567 (1985); *People v Flowers*, 222 Mich App 732, 736; 565 NW2d 12 (1997). The medical expert testified that the victim suffered a displaced fracture in his right forearm. He explained that "there was bleeding into the soft tissue surrounding that fracture and no evidence of healing, indicating that this was an acute injury inflicted at or very close to the time of this child's death." The expert explained that the photograph demonstrated "the acute bleeding that is in the soft tissues immediately surrounding the fractures." Contrary to defendant's suggestion, the fact that he did not dispute that the victim suffered a broken arm does not render the photograph inadmissible. See *Mills*, *supra* at 71. Moreover, a relevant photograph is not inadmissible merely because of its gruesome or shocking nature. *Id*. at 76. Additionally, the trial court's careful consideration of the prejudicial nature of the photograph is apparent from the record. The court examined and excluded several additional autopsy photographs. See *People v Herndon*, 246 Mich App 371, 413-414; 633 NW2d 376 (2001). The trial court did not abuse its discretion in admitting the photographic evidence.

---

[4] The court noted that it did not find "an absolute deception in this matter."

[5] Defendant requested and was provided water.

VI. Videotape of Defendant's Interview

Defendant also argues that the trial court erred in admitting the videotape of his interrogation because the prosecution failed to establish the necessary chain of custody. We disagree.

"The rule governing the admission of physical evidence requires that a proper foundation be laid and that the articles be identified as that which they purport to be and that the articles are shown to be connected with the crime or with the accused." *People v Furman*, 158 Mich App 302, 331; 404 NW2d 246 (1987) (citation omitted). A perfect chain of custody is not required for the admission of real evidence. *People v White*, 208 Mich App 126, 130; 527 NW2d 34 (1994). Such evidence may be admitted where the absence of a mistaken exchange, contamination, or tampering has been established to a reasonable degree of probability or certainty. *Id*. at 133. "Once a proper foundation has been established, any deficiencies in the chain of custody go to the weight afforded to the evidence, rather than its admissibility." *Id*. (emphasis added).

In this case, the chain of custody was substantially complete, and an adequate foundation for the admission of the videotape was laid. A police detective testified that he removed the videotape at the conclusion of defendant's interrogation on September 11, 2004. He locked the videotape in his office at the police detective bureau. On September 14, 2004, he made a duplicate copy, and placed the original in the evidence room. The officer testified that the videotape accurately reflected and depicted the interrogation of defendant that he conducted on September 11, 2004. There is no indication that the videotape was mistakenly exchanged, contaminated, or tampered with. In fact, defendant never argued that the videotape was altered or tampered with in any way. Under these facts, the trial court did not abuse its discretion in admitting the videotape.

VII. Sufficiency of the Evidence

Defendant argues that the trial court erred by denying his motion for a directed verdict on the charge of first-degree felony murder because there was no evidence of malice. We disagree.

This Court reviews a trial court's decision on a motion for a directed verdict de novo to determine whether the evidence, viewed in the light most favorable to the prosecution, could persuade a rational trier of fact that the essential elements of the crime were proved beyond a reasonable doubt. *People v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001). Circumstantial evidence and reasonable inferences arising from the evidence can constitute satisfactory proof of the elements of the crime. *People v Truong (After Remand)*, 218 Mich App 325, 337; 553 NW2d 692 (1996). All conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

The elements of first-degree felony murder are (1) the killing of a human being, (2) with malice, and (3) while committing, attempting to commit, or assisting in the commission of any of the felonies enumerated in MCL 750.316(1)(b), which in this case is first-degree child abuse. *People v Nowack*, 462 Mich 392, 401; 614 NW2d 78 (2000). Defendant challenges only the intent element. As previously indicated, malice is "the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and willful disregard of the likelihood that the

natural tendency of such behavior is to cause death or great bodily harm." *Werner, supra* at 531. An actual intent to harm or kill is not required. Rather, the prosecution must establish the intent to commit an act "that is in obvious disregard of life-endangering consequences." *Id*. (citations omitted).

Viewed in a light most favorable to the prosecution, a rational trier of fact could have found the required elements of first-degree felony murder, including malice. Evidence was presented that the five-week-old victim suffered a skull fracture, subdural hematoma, subarachnoid hemorrhage, brain swelling, retinal and optic hemorrhages, severe brain damage, and a broken arm. The expert medical testimony established that there was no medical explanation for the victim's severe injuries. Rather, the victim suffered injuries consistent with receiving a "significant blunt impact" in the head, being shaken, and "aggressive[ly] grabb[ed] and squeez[ed]" in the chest. There was no dispute that defendant was the only person in the home with the victim. In a statement to the police, defendant admitted shaking the victim "pretty hard," jab[bing]" him in the head with a closed fist, choking him, and forcefully shaking him. Defendant did not call for help after hearing the victim's arm "pop," or when the victim stopped breathing momentarily after defendant choked him. There was also evidence that defendant gave inconsistent and partial statements to the police about how the victim was injured.

From this evidence, viewed in a light most favorable to the prosecution, a rational trier of fact could reasonably infer that defendant acted with malice. The trial court did not err by denying defendant's motion for a directed verdict on the charge of first-degree felony murder.

VIII. Great Weight of the Evidence

Alternatively, defendant argues that the trial court abused its discretion in denying his motion for a new trial because, in the absence of malice, the verdict of second-degree murder was against the great weight of the evidence.[6] We disagree.

This Court reviews a trial court's decision denying a motion for a new trial for an abuse of discretion. *People v Crear*, 242 Mich App 158, 167; 618 NW2d 91 (2000). In evaluating whether a verdict is against the great weight of the evidence, the question is whether the evidence preponderates heavily against the verdict so that it would be a miscarriage of justice to allow the verdict to stand. *People v Lemmon*, 456 Mich 625, 627; 576 NW2d 129 (1998). A verdict may be vacated only when it "does not find reasonable support in the evidence, but is more likely to be attributed to causes outside the record such as passion, prejudice, sympathy, or some extraneous influence." *People v DeLisle*, 202 Mich App 658, 661; 509 NW2d 885 (1993) (citation omitted).

For the reasons discussed in part VII, the verdict is not against the great weight of the evidence. The evidence does not clearly preponderate so heavily against the verdict that a

[6] The elements of second-degree murder are "(1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse." *Aldrich, supra* at 123 (citation omitted).

miscarriage of justice would result if the verdict was allowed to stand. *Lemmon, supra*. Consequently, this claim does not warrant reversal.

IX. Offense Variable 7

We reject defendant's claim that the trial court abused its discretion in scoring OV 7 of the sentencing guidelines. "A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). A scoring decision "for which there is any evidence in support will be upheld." *Id*. (citation omitted).

MCL 777.37(1)(a) directs a score of 50 points if the victim was "treated with sadism, torture, or excessive brutality." The trial court's score of 50 points was supported by the evidence that defendant assaulted the five-week-old victim over a period of 10 to 15 minutes. Defendant admitted that he jabbed the infant in the head, pushed him five feet across the floor with his foot, shook the child's body "pretty hard," choked him, and broke his arm. As a result of defendant's acts, the five-week-old victim suffered a fractured skull, brain damage, six broken ribs, and a broken arm. This evidence indicates that the five-week-old victim was treated with excessive brutality and supports the trial court's score of 50 points for OV 7.

We also reject defendant's claim that he must be resentenced because the trial court's factual findings supporting its scoring of OV 7 were not determined by a jury, contrary to *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). In *Blakely*, the United States Supreme Court struck down as violative of the Sixth Amendment a determinate sentencing scheme in which the sentencing judge was allowed to increase the defendant's maximum sentence on the basis of facts that were not reflected in the jury's verdict or admitted by the defendant. Our Supreme Court has determined that *Blakely* does not apply to Michigan's indeterminate sentencing scheme. *People v Drohan*, 475 Mich 140, 159; 715 NW2d 778 (2006); *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004).

Affirmed.

/s/ Henry William Saad
/s/ Mark J. Cavanagh
/s/ Bill Schuette